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IN THE
UNITED STATES COURT OF APPEALS
- For the Fourth Circuit

No. 14,241

EERIK HEINE, Appellant,

v.

JURI RAUS, Appellee.

BRIEF FOR APPELLEE

Paul R. Connolly
J. Alan Galbraith
1000 Hill Building
Washington, D. C.
20006

E. Barrett Prettyman, Jr.
815 Connecticut Ave.
Washington, D. C.
20006

Attorneys for Appellee

Of Counsel:

Williams & Connolly
1000 Hill Building
Washington, D. C. 20006

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

LAW OFFICES
WILLIAMS & CONNOLLY
1000 HILL BUILDING
WASHINGTON, D. C. 20006

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INDEX

	Page
Issues Presented for Review	1
Statement of the Case	2
Statement of Facts	4
Argument	9
The District Court properly determined that the instructions given Raus were both authorized and thereafter ratified by responsible CIA officials	9
a. Under the circumstances Heine was not entitled to take the deposition of Richard Helms	10
b. The findings of fact entered by the District Court are fully supported in the record	11
c. The District Court properly accepted the claims of privilege asserted by the Government	13
Conclusion	15

CASES AND MATERIALS

<u>Barr v. Matteo</u> , 360 U.S. 564 (1959)	9
<u>Frost v. Stern</u> , 298 F.Supp. 778 (D.S.C. 1969)	12
<u>Heine v. Raus</u> , 399 F.2d 785 (4th Cir. 1968)	2, 3, 12, 13, 14
<u>Heine v. Raus</u> , 305 F.Supp. 816 (D.Md. 1969)	4, 6, 7, 8, 10, 13

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<u>Houtenville v. Dunahoo</u> , 286 F.Supp 5 (N.D. Miss. 1968)	12
<u>Howard v. Lyons</u> , 360 U.S. 593 (1959)	12
<u>Scherer v. Brennan</u> , 379 F.2d 609 (7th Cir. 1967)	12
<u>Scherer v. Morrow</u> , 401 F.2d 204 (7th Cir. 1968)	9
<u>United States v. Reynolds</u> , 345 U.S. 1 (1953)	13
Rule 56(c) & (e), Fed.R.Civ.P.	12

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IN THE
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 14,241

EERIK HEINE, Appellant,

v.

JURI RAUS, Appellee.

STATEMENT OF ISSUES
PRESENTED FOR REVIEW

Whether the remand hearings, which resulted in factual findings by the District Court that responsible CIA officials both authorized and approved the instructions given defendant Raus, complied with the directions of this Court.

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WILLIAMS & CONNOLLY
1000 HILL BUILDING
WASHINGTON, D. C. 20006

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STATEMENT OF THE CASE

Upon the first appeal this Court concluded that defendant Raus could appropriately assert the absolute privilege accorded a governmental officer or agent acting within the scope and course of his duties as a bar to plaintiff Heine's slander action, provided Raus could establish that the instructions he received were either authorized by or approved by responsible CIA officials.

We conclude that the absolute privilege is available to Raus if his instructions were issued with the approval of the Director or of a subordinate authorized by the Director, in the subordinate's discretion, to issue such instructions, or if the giving of the instructions was subsequently ratified and approved by such an official. [Heine v. Raus, 399 F.2d 785, 791.]

On the record before it, this Court was unwilling to say, as a matter of law, that the CIA had either authorized or approved the instructions, although this Court found in the record a "strong" implication that Raus had acted under proper authority or that his instructions had been ratified. ^{1/} This Court thus vacated the summary judgment awarded in favor of Raus. It directed the District Court to hold a further hearing if Heine

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1000 HILL BUILDING
WASHINGTON, D. C. 20006

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1/ Heine v. Raus, 399 F.2d 785, 791.

represented to the Court that he was placing "serious reliance" on a possible inference, not yet completely foreclosed by the record, that the instructions were not given by, or with the approval of, an authorized officer and that they were not later ratified. This Court strictly circumscribed the bounds of a remand hearing:

The inquiry should be directed to the identity of the official within the Agency who authorized or approved the instructions to Raus. Disclosure of the identity of the individual who dealt with Raus is not required; the answer to be sought is whether or not the Director or a Deputy Director or a subordinate official, having authority to do so, authorized, approved or ratified the instructions. [Heine v. Raus, 399 F.2d at 791.]

Following vacation of the judgment, Heine represented to the District Court that "he seriously relies upon the inference that the actions and statements of Juri Raus, the defendant, against the plaintiff, were not with the approval of a responsible official of the Agency having authority to issue or approve such instructions." (J.A.) The District Court reopened the proceeding to make the limited inquiry sanctioned by this Court. At the conclusion of the proceedings hereinafter described, the District Court found that the instructions given Raus had been issued by an authorized CIA officer and, subsequently, that the instructions had also been approved or ratified. Accordingly, the District Court awarded summary judgment in favor of Raus for the second time. This appeal followed.

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STATEMENT OF FACTS

The course of the remand proceedings is fully set forth in the District Court's second opinion. See Heine v. Raus, 305 F.Supp. 816, 819-821 (D.Md. 1969). Because Heine challenges in this Court the fairness of the hearing he received, we sketch the highlights of those proceedings.

At the request of the parties the District Court held a conference on February 10, 1969, to determine the procedure to govern the remand hearing. (J.A.) At that time Raus tendered the affidavit of Richard Helms, Director of Central Intelligence, stating in substance that (1) Raus had received his instructions from an authorized counterintelligence officer, ^{2/} (2) in December

2/ In the first remand affidavit, dated February 10, 1969, Helms explained that counterintelligence officers responsible to him received from intelligence sources information which brought them to the conclusion that Heine was a KGB agent. Helms further explained that "the counterintelligence officer responsible for safeguarding sources of intelligence developed in Estonian emigre groups, acting in accordance with his prescribed duties, instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent." The Court asked the Government to clarify whether the counterintelligence officer who instructed Raus was one of the officers who evaluated the information received from intelligence sources. In a supplemental affidavit, filed April 2, 1969, Helms stated that the same officer was involved, thereby clarifying the fact that this officer was responsible to Helms as a Deputy Director.

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of 1964, after this litigation had been brought, he (Helms) as a Deputy Director had approved and ratified the counterintelligence officer's instructions, and (3) as Director, he could affirm that, as a Deputy Director, he had authority to approve the instructions given Raus. Upon the basis of this new affidavit Raus again moved for summary judgment.

At this conference Heine requested leave to take the oral deposition of the Director. The Court stated that, before ruling on Heine's motion, it wanted Heine to submit questions he proposed to ask the Director in order that the Court might understand what areas he desired to explore. (J.A.) On March 19, 1969, Heine served 35 questions on Raus to be answered by the Director. (J.A.) Raus objected to them all. (J.A.) On behalf of the Director, the United States informed the Court that it would defer any consideration of the secrecy privilege until the Court had ruled on the propriety of the questions submitted by Heine. (J.A.)

At the second hearing, held June 6, 1969, the Court ruled, question by question, on the objections interposed by Raus. (J.A.) The Court found fourteen questions to be within the scope of the remand hearing, disallowed nineteen questions, and reserved ruling on two. (J.A.) Thereafter, the United States informed the Court by letter that it opposed the taking of Mr. Helms' deposition but, subject to the claim of governmental privilege, would answer the questions permitted by the Court.

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These responses were filed on September 29, 1969. The Director responded to all questions; with respect to three questions, he limited the amount of disclosure through assertion of the secrecy privilege. (J.A.) ^{3/}

At the third hearing, held October 17, 1969, Heine renewed his request to take the oral deposition of Mr. Helms. (J.A.) The Court agreed that, as a general proposition, discovery through oral depositions is usually more satisfactory than discovery through written interrogatories; while commenting that the Director's answers seemed "very full" (J.A.), the Court demonstrated a willingness to allow the Director's deposition, if Heine could make some showing that further substantive matters would be developed. ^{4/} Accordingly, the Court pressed counsel for Heine for "an example of a couple of the questions you

3/ In these questions (3, 5 and 12) Heine sought to develop additional information about the counterintelligence officer who instructed Raus. Beyond stating that he was a full-time staff employee and referring to the disclosures in the remand affidavits, Helms invoked a claim of privilege and declined to divulge other information. These questions and answers are set forth in footnote 4 of the District Court's opinion, 305 F.Supp. at 819.

4/ On behalf of the Director the United States opposed the taking of Mr. Helms' deposition. Its position was well expressed in a letter of July 16, 1969, to the Court from Mr. Yeagley, Assistant Attorney General. Because relevant questions might have sought information that could not be disclosed, Mr. Yeagley emphasized the burdens inevitably accompanying a decision to invoke the privilege against disclosure of state secrets -- review of voluminous files containing sensitive material, consultation within the Agency, and a considered determination by the Director himself. An oral examination did not, in the Government's view, offer sufficient opportunity for reflection nor did it provide a satisfactory forum for the performance of these tasks. Nevertheless, the District Court was, initially, willing to accommodate the Director only to the extent of holding the deposition in Virginia under the auspices of the Court. (J.A.)

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want to ask [Mr. Helms]. You must have some idea." (J.A.)
Counsel for Heine first brought into question the power of
Mr. Helms, as a Deputy Director in 1964, to ratify Raus' action.
(J.A.) In view of the affidavits and answers then of
record, the Court correctly noted that the issue remaining was
legal, as opposed to factual. (J.A.) The Court again
asked counsel for a proper question. (J.A.) Counsel for
Heine stated he would like to inquire about the specific form of
the instructions given Raus (J.A.) and about the information
available to Mr. Helms when he reviewed Raus' action. (J.A.)
But in these areas further inquiry would have been pointless
because, as the District Court stated in its opinion, the Director
had already made known his intent to invoke the secrecy privilege.
Thus, after fully indulging counsel for Heine, the Court could
see no line of inquiry warranting an oral deposition of the
Director. ^{5/}

Subsequently, in a formal opinion, the Court found:

The Director's affidavit . . . supported by
his answers to interrogatories, shows:

- (a) that the instructions to Raus were given
by a subordinate official of the agency,
authorized to do so, and acting in the
course of his prescribed duties and not by
an unauthorized underling; and
- (b) that Helms, as Deputy Director of the Agency
in December, 1964, was authorized to and did

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5/ Heine v. Raus, 305 F.Supp. at 820.

ratify and approve the action taken by the counterintelligence officer who instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent. [Heine v. Raus, 305 F.Supp. at 821.]

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WILLIAMS & CONNOLLY
1000 HILL BUILDING
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ARGUMENT

The District Court properly determined that the instructions given Raus were both authorized and thereafter ratified by responsible CIA officials.

As previously noted, this Court in its former opinion accepted and applied the now well-recognized principle that an employee of the United States acting within the scope of his authority is immune from liability for defamation on account of his utterances. Barr v. Matteo, 360 U.S. 564 (1959). ^{6/}

This Court likewise approved the method which the District Court had employed during its former hearings to deal with the problem of governmental secrecy.

It found, however, upon the record presented to it a possible -- if unlikely -- inference which would prevent the entry of summary judgment. The remand to the District Court was for a narrow purpose -- to make inquiry as to the existence of one or another condition: (a) whether an authorized CIA official instructed Raus, or (b) whether an authorized official ratified the actions of the official who provided the instructions.

The District Court found both proper authorization and proper ratification. ^{7/}

^{6/} No case subsequent to this Court's application of the principle has reflected adversely upon Barr or upon this Court's decision. The principle was applied in an analogous case decided soon after Heine v. Raus. Scherer v. Morrow, 401 F.2d 204 (7th Cir. 1968).

^{7/} Heine's brief is larded with invective and vituperation; e.g., "The defendant and the CIA have cleverly avoided the out-right lie of calling Raus an employee . . ." (p. 16). " . . . in light of the history of this case and the bald-faced lies issued by the defendant, the CIA and Richard Helms . . ." (p. 17). Since the decisional process is not aided thereby, we resist the temptation to reply, while representing the excess of advocacy which prompted its use.

In the District Court Heine constantly sought to enlarge the opening provided him by this Court so as to relitigate many of the issues which were foreclosed to him by this Court's previous opinion. He complains in this Court that he did not receive a fair hearing; we explain below why his attack upon the judgment is without merit.

- a. Under the circumstances Heine was not entitled to take the deposition of Richard Helms.

The record of the October 17, 1969, hearing shows that the District Court was disposed to permit the deposition of Richard Helms, despite the practical objections raised by the United States, provided that counsel for Heine could suggest a single question, based in fact, which (a) was within the scope of the remand, and (b) was not in an area to which the Director, in his responses to Heine's interrogatories, had asserted a claim of the secrecy privilege. Counsel for Heine could not suggest any specific question which met these criteria. In its opinion the Court accurately summarizes what occurred:

The Court repeatedly asked counsel for plaintiff what information they wished to obtain in addition to that included in the Director's affidavits, particularly the affidavits of February 10, 1969, and April 2, 1969, and in his answers to those interrogatories which the Court required him to answer. Aside from matters on which the Director claimed privilege, counsel for plaintiff did not suggest any other questions, but elected to stand on the record. [Heine v. Raus, 305 F.Supp. at 820.]

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Counsel for Heine expected too much if, at the time of the remand hearing, they could not suggest to the Court a single, meaningful question which would have justified the taking of a deposition. The Court prodded counsel for Heine to spell out, if only in small degree, what they sought to accomplish by an oral deposition. The patience of the Court, we think, is amply demonstrated by the record. In these circumstances counsel for Heine should not now complain that the denial of the request for an oral deposition of the Director of Central Intelligence deprived their client of a fair hearing.

- b. The findings of fact entered by the District Court are fully supported in the record.

We do not understand how Heine can question the District Court's factual rulings in this Court. Admittedly, they were entered on the strength of affidavits and sworn answers to interrogatories but, as already pointed out, counsel for Heine made no showing whatsoever how the limited inquiry ordered by this Court would be advanced through oral deposition.

Furthermore, on the first appeal this Court explicitly approved the use of affidavits. In discussing whether the claim of governmental privilege had been properly invoked, this Court said:

While the claim of secrecy prevents our obtaining a clear view of the entire scene, the Director's sworn, but undocumented, claims are enough to support the claim of governmental privilege. That ought to be enough when the statements are those of

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WILLIAMS & CONNOLLY
1000 HILL BUILDING
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—
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an official in so responsible an office and a requirement of further documentation and elaboration would violate the privilege of state secrets or greatly burden its exercise. [Heine v. Raus, 399 F.2d at 790.]

In other cases involving the doctrine of immunity for official acts, courts have regularly relied upon affidavits setting forth the duties of the government officer against whom suit has been brought. See, e.g., Howard v. Lyons, 360 U.S. 593, 595-596 (1959); Scherer v. Brennan, 379 F.2d 609, 610-611 (7th Cir. 1967); Frost v. Stern, 298 F.Supp. 778, 780 (D.S.C. 1969); Houtenville v. Dunahoo, 286 F.Supp. 5, 7 (N.D. Miss. 1968). When such affidavits are not controverted by other sworn testimony, they afford an ample basis for summary judgment. In this case the District Court's careful opinion underscores its faithful observance of the requirements of Rule 56(c) & (e), Fed. R. Civ. P.

But Heine contends that the District Court should have rejected the affidavits submitted upon remand because they assert conclusions rather than state facts. In this case the questions of authorization and approval, however, are straightforward matters of fact. The official instructing Raus was responsible to Helms. As a Deputy Director, Helms knew whether this official acted within the scope of his duties. Helms swears that he did. As a Deputy Director, Helms either approved the official's actions or he did not. Helms swears that he did. These are plain statements of fact by the senior intelligence officer of the United States,

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WILLIAMS & CONNOLLY
1000 HILL BUILDING
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an individual directly responsible to the President. They fully warrant the award of summary judgment in favor of Raus. ^{8/}

- c. The District Court properly accepted the claims of privilege asserted by the Government.

This Court's opinion on the first appeal states with unmistakable clarity that disclosure of the identity of the counterintelligence officer instructing Raus was not required. See Heine v. Raus, 399 F.2d at 791. Three of Heine's interrogatories sought to elicit detailed information concerning the job description of the counterintelligence officer. To these questions the Director claimed the privilege against disclosure of state secrets and the District Court sustained him. ^{9/} Heine v. Raus, 305 F.Supp. at 821.

In this Court Heine contends that the District Court's acceptance of the claims of privilege did not comport with the standards enunciated in United States v. Reynolds, 345 U.S. 1 (1953). In its answers to the interrogatories, however, the

^{8/} In light of the factual representations contained in the remand affidavits, an in camera hearing was unnecessary. Nor did Heine request such a hearing. There is nothing in this Court's opinion on the first appeal which compelled an in camera hearing, and Heine's present contention in this Court that the District Court was so obligated is frivolous.

^{9/} Except as to the fact that the officer was a full-time staff employee of the Agency covered by the Civil Service Retirement Act.

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WILLIAMS & CONNOLLY
1000 HILL BUILDING
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Government had already invoked the privilege, and the Government asserted the privilege in an area already closed to Heine by the prior opinion of this Court. In these circumstances the District Court had no Reynolds duty to conduct another hearing to test the sincerity of the invocation of the privilege. Furthermore, because the District Court had once conducted a Reynolds hearing in this litigation, and had done so in a manner approved by this Court (see this Court's opinion, 399 F.2d at 788), the District Court was not obligated to conduct yet another such hearing.

LAW OFFICES
WILLIAMS & CONNOLLY
1000 HILL BUILDING
WASHINGTON, D. C. 20006

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CONCLUSION

Appellee Raus requests that this Court affirm the judgment entered below.

Respectfully submitted,

/s/
Paul R. Connolly

/s/
J. Alan Galbraith
1000 Hill Building
Washington, D. C. 20006

/s/
E. Barrett Prettyman, Jr.
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for Appellee

Of Counsel:

Williams & Connolly
1000 Hill Building
Washington, D. C. 20006

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

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WILLIAMS & CONNOLLY
1000 HILL BUILDING
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30 April 1970

NOTE TO THE FILE

RE Appellant's Brief, page 14

United States v. Lester citation incorrect; should be page 329.

Quoted material not in United States v. Lester, 248 F.2d 329.

Federal Practice Digest

United States v. Lester

282 F.2d 750

247 F.2d 496

21 FRD 376

Affd 282 F.2d 750

21 FRD 30

1969 Pocket Part

385 F.2d 62

363 F.2d 68

328 F.2d 971

287 F.Supp. 870

235 F.Supp. 115

21 FRD 376

The above cases rechecked and were found not to contain the quoted material set forth in the Appellant's Brief at page 14.

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REPLACES FORM 36-8
WHICH MAY BE USED.

(47)

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